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In The

Supreme Court of the United States

OCTOBER TERM, 1988

FRANK SCOTTO, and ROBERT COAR,

Petitioners,

-vs-

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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INTRODUCTION

This case squarely poses the question of whether the Court is prepared to countenance, as the Third Circuit appears ready to countenance virtually every garden variety conspiracy to violate a federal statute automatically becoming a potential RICO conspiracy, and even the humblest case, as long as it involves at least two people jointly committing a federal offense, becoming a RICO prosecution.

From the outset the defendants insisted this case should have been pled as a simple conspiracy to violate 18 U.S.C. §1954, under 18 U.S.C. §371, rather than as a RICO conspiracy under 18 U.S.C. §1962(d). The correctness of this position was demonstrated when at trial after the government presented its case, most of the original 90+ counts were either voluntarily dismissed, or fell in response to petitioners' F.R.Crim.P. 29 motion. This left only the drastically reduced charges relating directly to two separate agreements, i.e., one charged

against Coar and Scotto, another against Zauber alone, as embodied in a redacted indictment. (Pa 39-57[1])

The government no doubt recognizes that the prospect that virtually every federal conspiracy case may now be charged as a violation of § 1962(d), if literally expressed, would be daunting to many, though this conclusion must logically follow from the Third Circuit's decision. Accordingly, while no doubt standing poised to cite this decision in support of its next step in the ever-accelerating process of RICO supplanting the entire body of federal criminal jurisprudence developed since the birth of the republic, the government nowhere acknowledges this is the plain implication of the Third Circuit's holding.

Instead the government tries to camoflage the transcendant significance of the doctrine in this case by implying it involved charges which,

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[1]"Pa " refers to Petitioners' Appendix.

in actuality, were not pled in the indictment, and "facts" that were neither alleged, nor the subject of proof at trial. The device it principally employs in this effort is the conflation of the proofs at trial, and the charges as to Coar and Scotto, which remained after the dismissal on appeal of all mail and wire fraud allegations,[2] with the proofs at trial, and the surviving charges alleged as to Zauber, on the other, and vice versa. Upon this manifestly wrong basis it contends that the surviving portion of the indictment alleged, and thus the jury verdict as to each defendant determined his agreement to the commission of "numerous violations of 18 U.S.C. [§]1954..." (Gov. Br. at 5)

SUMMARY OF FACTS PERTINENT TO THE CHARGES REMAINING AFTER DISMISSAL OF ALL SUBSTANTIVE COUNTS AND ALLEGATION IN THE FIRST COUNT BASED UPON §§1341 AND 1343.

a. Facts Pertinent to the Surviving Charges

The operative facts, and the allegations in

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[2]Under McNally v. United States, 107 U.S. 2875 (1987).

the indictment, that is, the facts pertinent to the allegations in the indictment which survived on appeal, are quite simple:

At the beginning of 1982 petitioner Coar, a former president of a Teamsters local in New Jersey, and petitioner Scotto, were serving as the sole trustees of the local's pension fund ("the Fund"). At that time Omni was a Florida mortgage company, whose president was Joseph Higgins. Some time that spring David Friedland, a former Fund attorney who had been convicted of a kickback violation relating to the Fund, suggested to Higgins that he might be able to persuade Coar and Scotto to invest some of the Fund's money in insured mortgage loans to be placed by Omni. He indicated to Higgins that he knew they wished to diversify the Fund's holdings, and would be favorably disposed to this sort of investment provided the Fund received an attractive guaranteed return.

Higgins agreed that if Friedland could land the deal with the Fund, he would become a silent

partner in Omni. Friedland also advised Higgins that it might be necessary to pay Coar and Scotto a kickback to secure approval of the proposal. Friedland made contact with Coar and Scotto, after which, on June 22nd, Higgins wrote a letter on behalf of Omni to the Fund seeking to present it with a proposal. In October, 1982, Coar and Scotto decided to place $20 million in fund assets with Omni. They authorized transfers to Omni of $15,000,000 by wire on October 14th, and $5,000,000 by mail on December 9, 1982. The government's proof was entirely circumstantial as to whether an agreement as to a kickback influenced this decision, aside from one disputed meeting in December of 1982. At that time, according to Higgins, Friedland, in the presence of Coar and Scotto, stated they were to receive a kickback. The government was unable to show any defendant ever actually received a kickback, as the Third Circuit acknowledged (Pa 35, n. 19)

b. The Surviving Charges

The surviving portion of the RICO conspiracy charge against Coar and Scotto rested entirely on these facts, involving a series of events limited to the period June through December 1982.[3] The alleged Coar-Scotto kickback "scheme" was depicted in the first of ten "Racketeering Acts" comprising the "pattern of racketeering activity" forming the basis of an 18 U.S.C. §1962(d) violation charged in the First Count of the original indictment.[4] This

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[3]The "length of time over which the [racketeering] acts [are to be] committed...," Bartichek v. Fidelity Union Bk., 832 F. 2d 36, 39 (3d Cir. 1987), not the term of related transactions, e.g., the length of the contract, determines "continuity," i.e., whether a series of events constitutes a "pattern" under § 1961(5).

[4]The original indictment also included 84 counts which were dismissed at trial, largely pled as mail or wire frauds under 18 U.S.C. §§1341/1343, defendants with aiding and abetting a series of fraudulent loans, and frauds and schemes in which Friedland and Higgins were involved through Omni, and covering up defaults on various Omni loans. The seven of the original ten "Racketeering Acts" pled in the First Count, which did not survive the conclusion of the government's case at trial, were pled wholly as mail/wire frauds, and paralleled the substan-

first "Racketeering Act" was entitled the "ROBERT COAR and FRANK SCOTTO Kickbacks." It alleged a "scheme" comprised of the initial decision to place the Fund's money with Omni, as being induced by an understanding that they would later receive "a share" in Omni's profits from the mortgages it placed, thereby depriving the Fund of its "intangible right" to their faithful service, in violation of both 18 U.S.C. §§1341 and 1343 (under the theory rejected later in McNally.) This theory spelled out in (a) and (b) of ¶4(1) (Pa 51-52) was that they conspired, only with Higgins and Friedland,

> to receive [from Higgins and Friedland]...a concealed share of the profits which Omni would make from investing the $20,000,000.-...[and in order to effectuate this scheme, they]...would and did, on multiple occasions,...cause [to be mailed various contracts, correspondence and other documents, or to be transmitted by wire communications]...relating to Omni's dealings with the Pension Fund. (Pa 51) (emphasis added)

Alternatively, it was alleged in subpart (c) of the ¶4(1), referring to the same scheme, that

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tive acts dismissed at trial.

> the Defendants ROBERT COAR and FRANK SCOTTO would and did, on multiple occasions, solicit, agree to receive and actually receive certain fees, kickbacks, commissions, [etc.]...because of their actions, duties and decisions...pertaining to the Pension Fund's dealings with Omni [in violation of 18 U.S.C. §1954. (Pa 52)

The June letter and the two transfers of funds each spawned a separate substantive mail or wire fraud count under 18 U.S.C. §§1341 and 1343 naming both Coar and Scotto, all resting on the "kickback scheme" depicted in the first of the "Racketeering Acts." However, they were not charged with any substantive §1954 violation, and, as noted, no evidence was presented to show that any defendant ever actually received a kickback, let alone "multiple kickbacks." Indeed, there was no direct evidence which the government could present to show that Coar or Scotto ever even solicited a kickback, as opposed to being offered one initially by Friedland, to be received at some indeterminate point when and if Omni's "profits" materialized.

Not only was Zauber unmentioned in the first

of the "Racketeering Acts," relating to the Coar/Scotto kickback scheme, he was not charged, nor was it alleged anywhere in the indictment, that he had been a party to, or even known of the kickback agreement involving Coar and Scotto. On the contrary, the kickback conspiracy allegation against him was the subject of a separate "Racketeering Act" in the "pattern," i.e, the "KENNETH P. ZAUBER Kickbacks."[5] All the proofs at trial were to the effect that any agreement Zauber made with Freidland and Higgins was made independently, at a later time; there was no evidence offered tending to show Zauber was ever aware that Coar and Scotto sought to receive a kickback from Omni, or vice versa.

In the redacted indictment the only point of tangency, and the only basis upon which the government, at the end of its case, could meld

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[5]This was the second of the "Racketeering Acts," ¶4(2) (Pa 52-54). It was also pled in three subparts, the first two alleging his agreement with Friedland and Higgins alone to violate §§1341 and 1343, and the third alleging Zauber agreed with them to violate §1954.

Coar and Scotto on the one hand, and Zauber on the other, intc a single RICO conspiracy under §1962(d), was a third "Racketeering Act," in which all were named. (Pa 54-55) That third "predicate act," pled under an "intangible rights" theory, §§1341/1343, appeared as ¶4(3) in the redacted indictment. (Pa 54) It spelled out an agreement among Coar, Scotto and Zauber, as well as Friedland and Higgins, to conceal various defaults and delinquencies on the Omni loans from the new trustees. Because it named all three defendants, it saved the RICO conspiracy count at trial by supplying as to each of them an agreement as to a second of the requisite "at least two acts" of a "pattern of racketeering activity." 18 U.S.C. §§1961(5)

With the failure of most of the government's case at trial, the RICO conspiracy charge was redacted to plead only these two "Racketeering Acts" against Coar and Scotto, one of which also named Zauber. Coar and Scotto were convicted on the three remaining substantive counts which

named them (all under §§1341/1343), and on the abbreviated Count One, together with Zauber.

In addition to reversing the convictions of Coar and Scotto on the substantive counts, and one of two substantive counts against Zauber under McNally, the Third Circuit struck all of the allegations in Count One which referred to violations of either §1341 or §1343. (Pa 23) This left only subpart (c) of ¶4(1), alleging the agreement of Coar and Scotto with Higgins and Friedland to violate 18 U.S.C. §1954 as the only surviving portion of the RICO "pattern" allegation. Unlike, subparts (a) and (b), it had no substantive counterpart.

Plainly the jury, in convicting Coar and Scotto on the substantive counts which were all mail or wire frauds, and all related to "executing the aforesaid [kickback scheme]...[,]" signified a determination that Coar and Scotto agreed, "for the purpose of executing the aforesaid scheme...," to use mails and wire "on multiple occasions." There was "no direct

evidence that any of the defendants actually received any kickback payments." (Pa 35, n. 19) Thus, while it found circumstantial evidence supporting the "inference that all of the defendants were involved in a kickback scheme..." it could not construe the verdict as implying any finding as to the nature of the quid pro quo Coar and Scotto sought to receive, or the anticipated mode of receipt beyond "that Coar and Scotto agreed to receive...a share of Omni's profits..." (Pa 25)[6]

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[6]The Third Circuit acknowledge that under the "conspiracy charge" which went to the jury, a finding of actual receipt was irrelevant. (Pa 35, n. 19) What this logically implies, and the Court implicitly recognized was that (1) the jury only had to find nothing more than that there was some sort of "kickback agreement"; (2) its "details," e.g., "multiple payments," were not germane to the verdict. But the court failed to deal with the fact that other possible "predicate acts" (i.e., under §§1341/1343,) abounded even under the redacted indictment which went to the jury, and also failed to consider the relationship, if any between the allegations as to a Coar/Scotto kickback, and a Zauber kickback agreement. Under the indictment which went to the jury it was sufficient for the jury merely to find, as a premise for both the substantive and conspiracy against Coar and Scotto under §§1341 and 1343, they had adgreed to receive in some form a single "share" of

The jury findings underlying the convictions on the substantive §§1341/1343 counts, all of which were dismissed on appeal, by themselves constituted determinations as to the actual occurrance of at least three (invalid) "racketeering acts" which could have been the basis for the jury finding the necessary "pattern." But the invalidity of the substantive mail and wire fraud counts and the corresponding parts of the first "racketeering act," required the Third Circuit to consider whether the establishment by the verdict of the existence of some sort of featureless kickback scheme also necessarily embraced a determination as to the existence of an agreement as to the commission by the defendants of "at least two" §1954 violations.

In contrast to the rigor displayed in treating the McNally issues, the Third Circuit's analysis of the verdict was remarkably simplistic. The surviving portions of the "pattern" in

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Omni's profits.

¶4(1)(c) and (2)(c) were not subjected to any analysis. The pivotal questions were disposed of by reasoning that since there were three defendants, each of whom had been found guilty of offenses based on a kickback scheme

> Therefore, the jury had to find [the defendants each agreed to the commission of] at least three violations of §1954 by convicting each defendant of RICO conspiracy [i.e., one by him and one by each of the other two defendants]. (Pa 33-34)

What the court totally failed to consider was that the jury was not asked to find, nor were Coar and Scotto charged with an agreement by Coar and Scotto to a kickback scheme which included a provision for a kickback to Zauber.[7]

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[7]The Fifth and Sixth Amendment guarantees of grand jury indictment, and fair notice, which together require that an indictment must cover all essential elements of the offense. United States v. Debrow, 346 U.S. 374 (1953). F.R.-Crim.P. 7(c) The indictment did not advise Coar and Scotto they also were charged with agreeing that Zauber would receive a kickback. But the "pattern" upon which the Third Circuit sustained the verdict on Count One made such an awareness an essential element of the § 1962(d) "pattern."

Also the "notice" provided by the indictment indicated that to be convicted under Count One they had to be found guilty not only as to the first of the identified "Racketeering Acts," but

They were not charged based on the same kickback agreement, or of even knowing of that agreement.

Indeed nowhere in the "Racketeering Act" relating to the "...COAR and ...SCOTTO Kickbacks," the only part of the RICO "pattern" surviving on under McNally, were Coar and Scotto charged with having "agreed to the commission of...[a racketeering act alleged - i.e., the receipt of a kickback]..." by Zauber, or by anyone other than themselves. (Govt. Br. at 8) See United States v. Carter, 721 F. 2d 1514, 1528-31 (11th Cir.), cert. den., 469 U.S. 819 (1984); followed United States v. Adams, 759 F. at 1116. In other words the Coar/Scotto kickback scheme and the Zauber kickback scheme were not alleged to be, and in fact were not shown to be parts of the same scheme, even if they were each a part of the same overall RICO conspiracy.

The surviving portion of the indictment cannot be read even as charging Coar and Scotto

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also as to a second "Racketeering Act," i.e., "at least two."

with simultaneously agreeing to the commission of "two...[racketeering] acts" under §1954. At most it charged that each agreed to jointly receive a single "share." The jury did not find "...that each petitioner agreed that he would receive one at least one kickback." (Govt. Br. at 7) No other elements of a possible "pattern" may be drawn from the surviving allegations in Count One.[8]

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[8]The verdict could be found to have necessarily embodied unanimous findings that each defendant's agreement subsumed both (1) an awareness of the "roles" and "participation" of all three defendants in a kickback agreement, (2) a specific understanding as to "multiple payments" as a "detail" or "means or method...," in other words that the agreement of each was to the "commission...[of] at least three violations of §1954..."(Pa31-2). This was plain given the jury charge that

> [t]he evidence need not establish that all the means or methods set forth in the indictment [e.g., multiple payments] were agreed upon to carry out the conspiracy.
>
> ***
>
> the defendant need not know all of the details of the conspiracy or the entire scope..., nor need he know the identities of, or the precise roles played by the other members .... He is only required to have knowledge of the essential features and the broad scope of the conspiracy.

ARGUMENT

THE STROMBERG TEST IS NOT AUTOMATICALLY SATISFIED IN AN 18 U.S.C. § 1962(d) CASE SIMPLY BECAUSE, BY DEFINITION, EACH SUCH CASE INVOLVES "AT LEAST TWO "DEFENDANTS

As far as the verdict reveals, the extent of the Coar and Scotto "kickback conspiracy" was an an agreement, to "share...their share," on a "one-shot basis." Even if this arguably contemplated the commission two crimes, one by Coar and one by Scotto's, theirs was merely an agreement to perform jointly and simultaneously the same "racketeering act," which heretofore never has been deemed sufficient as the "pattern" in a RICO conspiracy. United States v. Riccobene, 709 F.2d. 214, 224 (3d Cir. 1963), cert. den. 464 U.S. 849 (1983). United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), upon which Carter relied, 721 F.2d at 1530, requires

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In light of this charge, and as a matter of common sense it is hard to fathom why the jury, in reaching a verdict on the RICO charge, would have dwelled on the details of the kickback agreement, in the face of an abundance of easily identified mail/wire frauds.

an agreement "to commit at least two separate crimes in furtherance of the conspiracy's objective." Id. at 1039 (emphasis added.)

But now effectively the Third Circuit holds that in the absence of a special verdict, if the court can uphold the validity of a single federal crime alleged among the predicate acts which go to the jury, simply because "at least two" defendants agreed to it, any RICO conviction involving two or more defendants will automatically survive the test of Stromberg v. California, 283 U.S. 359 (1931), as to whether the verdict reveals "reveal[ed] the number or nature of the predicate acts on which the jury relied on in finding defendants guilty of conspiring to violate RICO..." (Pa29); United States v. Brown, 583 F. 2d 659, 669-70 (3d Cir. 1978), cert. den., 440 U.S. 669 (1979) at 669-70 and United States v. Holzer, 840 F. 2d 1343 (7th Cir. 1988)

Every guilty verdict against two defendants under the same RICO conspiracy count necessarily implies an agreement as to the commission by the

parties to the agreement, collectively, of "at least two" violations of federal law. But needless to say, every other federal conspiracy conviction, which by definition, must stand for the conclusion that "at least two" agreed upon the commision of at least one federal crime, most of which are also "predicate acts" under RICO. 18 U.S.C. §1961

The Third Circuit's "pattern" analysis in reality does not go beyond counting the number of defendants charged, even to consider whether Coar and Scotto were ever charged with entering into a kickback agreement which included Zauber. Cf. Gaither v. United States, 413 F. 2d 1061, 1071 (D.C. Cir. 1969); United States v. Mollica, 849 F. 2d 723, 729-30 (2d Cir. 1988).

As developed in the Zauber petition (at pp. 41-42), this reasoning effectively makes virtually every federal conspiracy a potential RICO conspiracy, and hastens the day, already fast approaching, when nearly every multiple defendant indictment will be a RICO indictment.

Simply because a reviewing court may well postulate that the grand jury would have indicted Coar for a 18 U.S.C. §371 conspiracy to violate §1954, had it known §§1341/1343 violations could not be proven, the government should not be let off the hook for the tactical choice it made in bringing a RICO indictment.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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